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Richard B. Lillich

THE JAY TREATY COMMISSIONS

RICHARD B. LILLICH †

During the past fifteen years the United States has relied upon the national claims commission device as its primary method of settling international claims.[1] These commissions, established by the United States and manned by United States citizens, have adjudicated large groups of claims by Americans against foreign countries.[2] The present active national commission, the Foreign Claims Settlement Commission, currently is engaged in handling several large claims programs.[3] So successful has this commission and its predecessors been that only twice since World War II has the United States resorted to the more traditional international mixed claims commission.[4]

Last year the present writer, after comparing the national with the international claims commission, concluded that the former's ascendancy "was due less to the

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† A.B., Oberlin, 1954; LL.B. with Specialization in International Affairs, Cornell, 1957; LL.M. (in International Law) and J.S.D., New York University, 1959, 1960. Assistant Professor of Law and Director, International Legal Studies, Syracuse University College of Law. Member of the New York Bar. On leave, Ford Fellow, London, 1963.

[1] See generally LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS (1962). For suggestions about the mechanics of preparing and presenting international claims, see LILLICH & CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962).

[2] Re, *The Foreign Claims Settlement Commission and International Claims,* 13 SYRACUSE L. REV. 516, 520-22 (1962).

[3] See generally Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction,* 60 MICH. L. REV. 1079 (1962).

[4] These two commissions were the United States-Japanese Property Commission, established under Article II of the Agreement With Japan, June 12, 1952, [1952] 3 U.S.T. & O.I.A. 4054, T.I.A.S. No. 2550, and the United States-Italian Conciliation Commission, established under Article 83 of the Treaty of Peace With Italy, Feb. 10, 1947, 61 Stat. 1410, T.I.A.S. No. 1648.

superior features of this method of adjudicating claims than to the inherent defects and repeated failures of mixed claims commissions." [5] While some commentators were in agreement,[6] other "doubting Thomases" called for a bill of particulars.[7] This article is an attempt to answer the demand, at least in part, by a case study of the three Jay Treaty Commissions which "inaugurated the modern era of international arbitration and introduced a means of adjustment . . . of disputes arising out of the protection of citizens abroad." [8] A thorough analysis of these commissions lays bare both the vices and virtues of the mixed claims commission device.

HISTORICAL BACKGROUND

Henry Adams once remarked that "of all portions of our national history none has been more often or more carefully described and discussed than . . . Jay's Treaty." [9] Granted that the Treaty of Amity, Commerce and Navigation of 1794 between Great Britain and the United States [10] has received thorough and frequent evaluation,[11] Adams' generalization loses validity when applied to the three international tribunals created pursuant to the treaty. Set up to adjudicate several sore points between the two countries, these mixed commissions were, at the time of their creation, unique in international law. But although they marked a renaissance in the jurisprudence of the judicial settlement of international disputes,[12] it generally being conceded that

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[5] LILLICH, *op. cit. supra* note 1, at 10.

[6] "Apart from the notorious delays and complexities of mixed commissions, in which government agents sift and present claims to government commissioners, the sheer volume of recent claims programs would necessitate national commissions." Levy, Book Review, 62 COLUM. L. REV. 919, 920 (1962). See also Re, *supra* note 3, at 1084-85.

[7] "[T]he reader might wish to know not only that mixed commissions failed, but also why they failed, why they were too slow and cumbersome in procedure." Franck, Book Review, 37 N.Y.U.L. REV. 344 (1962).

[8] DUNN, THE PROTECTION OF NATIONALS 53 (1932).

[9] ADAMS, THE LIFE OF ALBERT GALLATIN 158 (1879).

[10] 8 Stat. 116, T.S. No. 105 (effective Feb. 29, 1796).

[11] The most recent authoritative book on the treaty is by BEMIS, JAY'S TREATY (1923).

[12] "The end of the 18th century brought a change in the character of

"the modern era of [International] Arbitration may be conveniently considered as commencing with the Jay Treaty of 1794," [13] the commissions have received little scholarly attention. Their historical importance alone renders them worthy of study.

When John Jay, Chief Justice of the Supreme Court, sailed for England on May 12, 1794, the obstacles in the way of an amiable accommodation between the United States and Great Britain seemed insurmountable. "Never, indeed," noted one of Jay's biographers, "was a mission undertaken under a darker cloud of adverse circumstances." [14] The problems causing friction were twofold: (1) those stemming from unfulfilled and ill-conceived conditions of the Treaty of Peace of 1783; and (2) those resulting from the effect on neutrals of England's all-out war against France.[15]

On the first count, there can be no denial that the British, contemptuous of the Confederation and skeptical of the neophyte Union, had failed to comply with several provisions of the peace treaty. Although eleven years had passed since the signing of the pact,

England had never yet carried out, either according to its spirit or its letter, the treaty of peace. British troops still garrisoned several posts on our frontiers, and within the jurisdiction of the

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international arbitration which had always been of a diplomatic character but now took on a judicial one through the institution of the so called Mixed Commissions. Great Britain and the United States of America concluded the Jay Treaty on November 19, 1794, whereby for the first time a mixed commission was created for the settlement of differences between two States. Soon other States followed their example and gradually this jurisprudence attained an increasing influence on the development of international law." STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS at vii (1939).

[13] DARBY, INTERNATIONAL TRIBUNALS 769 (1904). See HUDSON, INTERNATIONAL TRIBUNALS 3 (1944); 1 MOORE, INTERNATIONAL ADJUDICATIONS at x (1929); 2 OPPENHEIM, INTERNATIONAL LAW 34 (7th ed. 1952); RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 191 (1929). See also text at note 8 *supra*.

[14] MCVICKAR, LIFE OF JOHN JAY 320 (1841).

[15] In a futile attempt to force France to surrender, Great Britain instituted an effective blockade of the French coast. France, unable to import from her colonies, attempted to circumvent the blockade by granting certain states the privilege of trading with her colonies and transporting such trade to metropolitan France. England then resorted to the measures, discussed in the text below, that gave rise to her difficulties with neutral nations like the United States.

United States. American citizens were excluded from navigating the great lakes; and Great Britain had neglected to make compensation for negroes carried away by the British fleet, after the war.[16]

England, however, was not the only offending party, since several of the American states "had prevented the collection of debts to English merchants contracted before the Revolution." [17]

On the second count, the British naval-diplomatic policy of attempting to cut off France from the sea, instigated by an Order-in-Council of June 8, 1793, was a severe blow to American shipping and was alleged to be a patent violation of neutral rights. The order instructed English commanders to bring into port all neutral vessels carrying corn, flour, or meal to France. No exception was made for American ships, as had been the case in a similar French decree. The American government vigorously protested that such foodstuffs were not contraband,[18] but this complaint was met with a second Order-in-Council of even greater severity.

The Order of November 6, 1793, ordered the capture of "all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony." Hundreds of American ships were plying the Caribbean and trading with the French West Indies when the British commanders swept them from the seas and brought them into British admiralty courts, where more than one hundred and fifty were condemned.[19]

Although this decree was superseded by a less objectionable Order on January 8, 1794, much damage already had been done. Over two hundred and fifty vessels were seized by

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[16] VAN SANTVOORD, SKETCH OF THE LIFE AND JUDICIAL SERVICES OF JOHN JAY 64 (1854).

[17] PELLEW, JOHN JAY 269 (1899). See also HILL, LEADING AMERICAN TREATIES 47 (1922).

[18] Foodstuffs were ordinarily not treated as contraband at the time. 2 OPPENHEIM, *op. cit. supra* note 13, at 805.

[19] MONAGHAN, JOHN JAY, DEFENSE OF LIBERTY 363 (1935). This order was not made public until late in December, 1794, allowing British warships and privateers to seize the choicest prizes before American shippers were given notice of the new English decree. See also BEMIS, *op. cit. supra* note 11, at 158.

March 1, 1794, and of these one hundred and fifty were condemned. Appeal rights were blocked by the strict application of British procedural rules.[20] Great Britain, not to be caught without a counterclaim, alleged with some justification that her commercial fleet had been raided by French privateers fitted out in American ports.[21]

Sitting down with his English counterpart, Lord Grenville, Jay spent the summer of 1794 thrashing out the above difficulties. Finding the Englishman adamant on the Negro question, Jay dropped this relatively minor matter. Grenville, on the other hand, conceded the known fact that British troops were stationed on American soil, conditioning their removal upon providing for the payment of debts owed British creditors. Jay, who acknowledged the justice of this latter claim,[22] acquiesced in the demand[23] and a mixed commission to adjudicate the authenticity of such debts, to be discussed in section III below, was provided for in article VI of the proposed treaty. This left the question of the northern boundary, which turned upon determining which river was the St. Croix referred to in the peace treaty, as the sole territorial dispute. This matter was entrusted by article V to a second mixed commission, to be considered in section II below.

Turning to maritime matters, Jay urged the establishment of a third mixed commission to handle the compensation cases.[24] He recommended

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[20] "The short time allowed for appeal from the island vice-admiralty courts to the higher tribunals in England and the temporary lack of funds of the ship captains, together with the impossibility because of time and distance to communicate with owners soon enough to start appeals, cut off all possibility of ultimate justice." BEMIS, *op. cit. supra* note 11, at 159. See also 1 JAY, THE LIFE OF JOHN JAY 325 (1833).

[21] PELLEW, *op. cit. supra* note 17, at 270.

[22] 1 JAY, *op. cit. supra* note 20, at 327.

[23] Jay realized that some provision for the payment of these debts would have to be made. Two months after he arrived in London he wrote President Washington: "They will, I think, *insist* that British debts, so far as injured by lawful impediments, should be *repaired* by the United States, by decision of mutual commissioners." 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 45 (1893).

[24] "The compensation cases are described in the answer [of Lord Grenville], and the amount of damages will, I have reason to hope, be referred to the decision of commissioners mutually to be appointed by the two governments." *Id.* at 44.

that commissioners should be appointed, who, upon due investigation, should award compensation for all American vessels and property that had been illegally captured and condemned during the existing war, "under colour" of authority and commissions derived from the king, and for which no redress could be obtained in his majesty's courts.[25]

His suggestion was accepted by the English minister, upon the condition that the commission also have jurisdiction over British claims arising from French privateers built or equipped in American ports, and a third commission, to be considered in section IV below, was established by article VII. This commission, whose procedure was thought by Jay to be too cumbersome,[26] became the most successful of the three Jay Treaty Commissions.

St. Croix River Commission

Jay's Treaty, signed November 19, 1794, was ratified by both nations the following year. Ratifications were exchanged October 28, 1795, and the treaty was proclaimed on February 29, 1796. Five months later the St. Croix commissioners had been appointed and this arbitration was underway.[27] Of this first commission, Moore has written:

The St. Croix River Arbitration enjoys a peculiar preeminence. As the first of the three distinct arbitrations for which the treaty . . . provided, it marks the revival in modern times of the practice of international arbitration. . . . In this sense it constitutes an epoch in the history of the application of the judicial method to the settlement of international disputes. But, while it thus possesses a world-wide general interest, it also has a profound local sig-

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[25] 1 JAY, *op. cit. supra* note 20, at 326.

[26] After the treaty was signed he wrote Edmund Randolph, the Secretary of State: "It is very much to be regretted that a more summary method than the one indicated in the seventh article could not have been devised and agreed upon for settling the capture cases; every other plan was perplexed with difficulties, which frustrated it." 4 CORRESPONDENCE, *op. cit. supra* note 23, at 140.

[27] The activities of the commission are described in 1 MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1-44 (1898) [hereinafter cited as MOORE, HISTORY AND DIGEST].

nificance, in that it marked the beginning and laid the foundation of the progressive amicable determination of the boundaries between the United States and the British dominions in America.[28]

The commission, according to article V of the treaty, was to fix the boundary of the northeast portion of the United States by determining "what river was truly intended under the name of the river St. Croix," mentioned in Article II of the Treaty of Peace. Disputes over this question had dragged on for a dozen years.[29]

Three commissioners were to be appointed to settle the matter. One was to be named by Great Britain; a second by the United States; and the third by the first two. If the first two commissioners could not agree, each was to propose one person and of the two names proposed one would be drawn by lot. The first commissioner was named by King George III in March, 1796 when he selected Thomas Barclay of Annapolis, Nova Scotia.[30] President Washington, after selecting General Henry Knox of Massachusetts, who declined to serve on the ground that he had a personal interest in the controversy, next appointed David Howell of Providence, Rhode Island.[31] "After some delay and difficulty these agreed upon Judge Egbert Benson of the City of New York, as third Commissioner." [32] Benson, an American but a relative of Barclay's, was, it seems, also a personal friend of John Jay.[33]

The first formal meeting of the trio took place on October 4, 1796, at St. Andrews, New Brunswick. After examining the written claim of the British agent who had been selected to argue the Crown's cause, the commission secured surveyors to make an extensive survey of the disputed region and then adjourned until the following August, when they reconvened on the 11th of the month in Boston, Massachusetts. There they took the testimony of John Adams

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[28] 1 MOORE, INTERNATIONAL ADJUDICATIONS at xcv (1929).
[29] *Id.* at 5-10.
[30] *Id.* at 10-11.
[31] *Id.* at 12-13.
[32] DARBY, INTERNATIONAL TRIBUNALS 769 (1904). A sketch of Judge Benson is given in 1 MOORE, INTERNATIONAL ADJUDICATIONS 23 (1929).
[33] 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 74 (1893).

and received the written deposition of Jay himself concerning what these men intended as the river St. Croix when they, as America's representatives, concluded the Treaty of Peace. The commission heard other witnesses, examined numerous documentary proofs and studied long, written arguments by the United States and British agents. Upon learning that the surveyors had not finished their task, the commission once again adjourned, agreeing to meet in June, 1798 at Providence, Rhode Island.

The survey of the Schoodiac River, which England claimed to be the St. Croix named in the peace treaty, proving even more time consuming than anticipated, the Providence session was postponed until August 20, 1798. Meeting on that date the three commissioners heard final arguments of the two agents until September 22, 1798, when they adjourned until October 15, 1798, at which time they received copies of the complete general map of the survey. From that date they met daily until the 25th of the month, when they completed their task and signed a unanimous award.[34] The Schoodiac River was determined the St. Croix intended by the treaty, but since the river separated, the northern branch was deemed that intended as the boundary.

Moore, in his evaluation of the award, takes issue with the conclusion that the result was a compromise arrived at by negotiation rather than by judicial determination.

> It certainly is true that the decision did not fully allow the claim of either party; but it is permissible to take the view that what appeared . . . to be a "negotiation" rather than a "judicial determination," since it required the abandonment by each of a part of his contentions, was after all only an example of the necessary process of adjustment, of the weighing of one consideration against another, by which, in the presence of proofs concerning the effect of which opinions may inevitably differ, concurrent and just human judgments, judicial and otherwise, are daily reached. Only those unfamiliar with boundary disputes will suppose that it is as easy to determine a range of hills or mountains

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[34] 2 MOORE, INTERNATIONAL ADJUDICATIONS 373-74 (1929).

or the course of a river on the ground as it is to follow a line on a map . . . the river was not ascertainable "by calculation or definite rule." The determination of the question involved the exercise of "judgment or opinion," of "discernment or discretion," and, if a precise result was to be reached, of a sentiment of accommodation.[35]

Article V specified that the award of the commission was to be "final and conclusive, so that the same shall never thereafter be called into question, or made the subject of dispute or difference between them." The decision was so treated and the precedent of an arbitration's finality established for subsequent commissions.[36]

The St. Croix River Commission, with a pedestrian problem to adjudicate, added little to the substantive law of international claims. It did, however, resolve a hotly contested boundary question which could have led to serious difficulties, and it served to usher in a new era in the judicial settlement of international claims.

THE BRITISH DEBTS COMMISSION

The British Debts Commission, created by article VI to award compensation to British creditors of American debtors, was a more interesting if less successful tribunal.[37] To understand the duties of the commission, it is necessary to have a general knowledge of the history of the underlying obligations which foreshadowed its creation.

At the outbreak of the Revolution, many colonists owed substantial sums to British merchants. The collection of these debts was specifically guaranteed by Article IV of the Treaty of Peace, which provided: "It is agreed that cred-

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[35] *Id.* at 367-68. It is certainly incorrect to say, as Darby does, that the award was in favor of the United States, or that the United States contended that the Schoodiac River was intended under the name of the St. Croix, DARBY, *op. cit. supra* note 32, at 771-72.

[36] Hudson writes: "Once a decision on the merits is pronounced by an international tribunal it becomes definitive and final." HUDSON, INTERNATIONAL TRIBUNALS 121 (1944). He cites the St. Croix Commission as his example.

[37] The history of this commission is recorded in 1 MOORE, HISTORY AND DIGEST 271-98 (1898).

itors on either side, shall meet with no lawful impediments to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." [38] When a British creditor sought recovery in state courts, however, he was generally met with a plea of discharge, based upon a state confiscation act which authorized the payment of debts due Englishmen into state treasuries and made such payment a full discharge of the debtor's obligation. Thus, although the treaty provided for the recovery of debts,

> the Government of the United States was unable to execute it. The States refused to repeal their impeditive enactments, and the State courts continued to enforce them. The government of the confederation was practically powerless, and unable to afford a remedy.[39]

With the adoption of the Constitution, there was hope that the difficulty had been removed. Article VI, section II of that document, the so-called "supremacy" clause, provided in part that:

> all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

As Moore explains:

> The first object of this clause was to secure the execution of the obligation imposed by the fourth article of the treaty of peace; indeed, it was the non-application by the State courts of this article in opposition to impeditive State enactments that led the convention to insert the specific provision that all treaties "made," or thereafter to be made, should be binding on "the Judges in

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[38] 8 Stat. 82 (effective Jan. 14, 1784). This article, which concerned the payment of debts, must be clearly distinguished from article V, which dealt with the compensation of loyalists for the loss of their estates. In the case of the latter the United States refused to assume liability, it merely being stipulated that Congress should *earnestly recommend* that the state legislatures provide for the restitution of confiscated estates or for the payment of claims for losses on account of such confiscation. See 3 MOORE, INTERNATIONAL ADJUDICATIONS 17 (1929).

[39] 1 MOORE, HISTORY AND DIGEST 273 (1898).

every State," in spite of anything in its constitution or laws to the contrary.[40]

But despite the protestations of the United States that the above constitutional provision, coupled with the organization of the federal courts, had removed all obstacles to the recovery of British debts, England remained unconvinced. This posture had some justification, since numerous state courts were still upholding discriminatory state legislation despite the complex of the supremacy clause and Article IV of the Treaty of Peace.[41] *Ware v. Hylton,*[42] a sweeping decision of the Supreme Court upholding article IV over state acts and binding both federal and state courts, was yet to come. Thus when Jay arrived in London in the summer of 1794, he found the Foreign Office insistent upon treating the debts as international claims rather than as a judicial question which should be left to American courts. Jay, soon realizing that his yielding on this point was the *sine qua non* of a commercial treaty, agreed to the inclusion of these claims under Article VI of the Jay Treaty.

This article recited that bona fide debts contracted before the peace remained owing to Britishers by citizens or residents of the United States; "that by operation of various lawful impediments since the peace" the recovery of the debts had been delayed and the security thereof impaired; and "that, by the ordinary course of judicial proceedings, the British creditors" could not obtain full compensation for these debts. Therefore, it was agreed that "in all such cases, where full compensation for such losses and damages cannot, for whatever reason, be actually ob-

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[40] 3 MOORE, INTERNATIONAL ADJUDICATIONS 13 (1929).

[41] *Id.* at 173-74. See also Camp v. Lockwood, 1 U.S. (1 Dall.) 393 (1788).

[42] 3 U.S. (3 Dall.) 199 (1796). In this classic case a debt due from a Virginian to a Britisher had been paid into the Virginia treasury, pursuant to a state sequestering statute, and the debtor had been discharged. The Supreme Court held that Article IV of the Treaty of Peace gave the creditor an action against his debtor notwithstanding the state law. See also Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806), holding that the same article prevented the operation of a Virginia statute of limitations upon British debts contracted before the peace treaty.

tained, had and received by the said creditors in the ordinary course of justice, the United States will make full and complete compensation for the same to the said creditors." However, the application of this stipulation was specifically limited to "such losses only as have been occasioned by the lawful impediments aforesaid, and it is not to extend to losses occasioned by such insolvency of the debtors or other causes as would equally have operated to produce such loss, if the said impediments had not existed; nor to such losses or damages as have been occasioned by the manifest delay or negligence, or wilful omission of the claimant."

To ascertain the amount of such losses and damages, five commissioners were to be appointed; two by Great Britain, two by the United States, and the fifth by the four's unanimous vote. If the four could not agree, the commissioners of the two parties were each to propose one person, one of which was to be drawn by lot in the presence of the four original commissioners. At their first meeting they were to take an oath to render their awards "according to justice and equity." Three of the commissioners were to constitute a board with power to do any act pertaining to the commission, provided that one named by each nation plus the fifth commissioner were present. Decisions were to be made by a majority of the commissioners present. The commissioners were to meet first in Philadelphia and were to receive claims for eighteen months from the day they should first form; this period could be extended in particular cases for a term not to exceed six months.

The commissioners were granted the power to examine those who came before them under oath and to receive in evidence depositions or writings "being duly authenticated, either according to the legal form now respectively existing in the two countries, or in such other manner as the said commissioners shall see cause to require or allow." The award of any three commissioners, provided one was from each country and the third, the fifth commissioner, was to be "final and conclusive, both as to the justice of the claim, and to the amount of the sum to be paid to the creditor or claimant."

Great Britain appointed Thomas Macdonald and Henry Pye Rich as its commissioners, while the United States was represented by Thomas Fitzsimons of Pennsylvania and James Innes of Virginia.[43] The four original commissioners met in Philadelphia on May 18, 1797, and, being unable to agree to a fifth commissioner, chose John Guillemard, a Britisher living in the city, by lot. After receiving claims in the amount of $25,000,000, the commission began its consideration of the same in January, 1798. Both countries appointed agents and the commission laid down rules with regard to the reception of claims, which required the claimant or his agent to appear before the commission.[44] Rules as to evidence, especially evidence concerning the solvency or insolvency of the debtor, were also promulgated.[45]

Once into the consideration of claims, it became apparent that the two British commissioners (joined by their fifth "British" colleague) and the two American commissioners were hopelessly split on several key questions concerning the construction of article VI. These questions were:

1) *The question of interest.* The British contended that the word "debts" comprehended full interest in all cases for the detention and delay of payment during the war.[46] The Americans argued that the commission could award or refuse interest, in whole or in part, as the merits of each individual case warranted.[47]

2) *The question of solvency.* The British took the view that claimants did not have to prove the solvency of their debtors as a condition to recovery.[48] The Americans construed the article not to call for a presumption of solvency, thus relieving the United States of the burden of proving insolvency to avoid the payment of a claim.[49]

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[43] The latter died and was replaced in August, 1798 by Samuel Sitgreaves of Pennsylvania.
[44] 3 MOORE, INTERNATIONAL ADJUDICATIONS 26-29 (1929).
[45] *Id.* at 32-35.
[46] *Id.* at 77, 325.
[47] *Id.* at 79.
[48] *Id.* at 59, 67, 324.
[49] *Id.* at 68, 283.

3) *The question of exhaustion of local remedies.* The British considered that the commission should weigh claims in all instances where lawful impediments had stood at the time of the treaty's adoption in 1794, despite the fact that *Ware v. Hylton* had declared these impediments unlawful and despite the fact that the claimant had made no effort to pursue a remedy in an American court.[50] The Americans held that a lawful impediment had to exist at the time the claim was presented, and that "the mere delay of recovery, by the operation of lawful impediments is [not], of itself, a sufficient foundation for a claim; it must be such a delay as has produced a loss which cannot be repaired in the ordinary course of justice." [51] No claimant, they argued, had standing before the board until he had attempted and failed to secure a judicial remedy.[52]

4) *The question of eligibility.* The British thought that all natural-born British subjects who had had debts confiscated and were on the side of England at the time of the peace could, as British subjects, present claims.[53] The Americans, while admitting that those loyalists who had declared for Great Britain from the first should have standing before the board,[54] denied such status to those who had first sided with the colonists and later switched to the British.[55]

The net effect of the four above differences, if resolved in favor of the British, would have been to place the United States in the position of having to respond to almost every claim by one alleging British citizenship at the time of peace. The American commissioners, being unable to crack the three-man British majority on any vote,[56] resorted to the questionable practice of leaving the sessions

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[50] *Id.* at 59, 115, 324-25.
[51] *Id.* at 122.
[52] *Id.* at 164-65.
[53] *Id.* at 242.
[54] *Id.* at 99.
[55] *Id.* at 238, 299.
[56] It is interesting to note that, while there were unanimous decisions of the commission, there was no decision where any of the three Britshers voted with the two Americans when the commission was split. *Id.* at 264.

prior to an anticipated unfavorable vote, thereby blocking any action by the commission, which needed one commissioner present from each side before it could take action.

Unfortunately for the work of the commission, these disputes arose immediately after its inception, causing the commission's untimely demise before it had made a dent in the pile of claims. That the disputed points were brought to a head immediately was no accident; Thomas Macdonald, the British commissioner who spoke for the majority, wished to settle basic principles at the beginning and apply them to large batches of claims, rather than examine each case individually and determine the facts and the law thereof.[57] To effect his approach, Macdonald submitted some general rules at a very early session, all of which were favorable to England, which he suggested that the commission follow.[58] These rules and the manner in which they were presented greatly annoyed the American commissioners. In addition they were irked by Macdonald's assertion that English courts considered the United States to have been in a state of rebellion, rather than being independent states engaged in war, during the period from 1775 to 1783.[59] Little moderation was shown on either side following this incident, as the correspondence between the commissioners after their final breach indicates.[60]

This breach, which occurred in the fall of 1799, assured the commission's failure. Rufus King, United States minister at London, was instructed to negotiate a new convention to spell out America's obligations under article VI. King presented a draft to Lord Grenville in April 1800, but he soon found that the latter "was not inclined either to negotiate a new convention or to discuss the question of a lump sum." [61] Finally, Lord Grenville agreed to a lump

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[57] *Id.* at 263.
[58] *Id.* at 58-59.
[59] *Id.* at 279. His argument went to the question of eligibility. If the states were only in rebellion, all loyalists retained their British citizenship throughout the period. If the states were independent, however, loyalists could have become American citizens before later siding with the British.
[60] *Id.* at 268-326.
[61] *Id.* at 353.

sum settlement, and on January 8, 1802, a convention was concluded whereby article VI of the treaty of 1794 was annulled and the sum of £600,000 was accepted by Great Britain in satisfaction of the liability of the United States under the article.[62]

In assessing the reasons for the commission's failure, prime responsibility must be assigned to the drafters of article VI. While the terms of the article read easily, an examination of the indicated points in dispute readily shows that the original treaty provision was drafted without profound regard for the complex substantive and procedural problems the commissioners were to face. In approaching difficult problems the commission, unlike its maritime claims counterpart, had no body of international law on which to draw. Reference to municipal law to determine such issues as the status of the states from 1775 to 1783 and the relation of federal treaties to state laws under the Constitution inevitably resulted in conflicting opinions. Furthermore, unlike the St. Croix Commission, no spirit of accommodation was present among the commissioners. Moore has observed:

> One can hardly study the records of the commission under Article VI without perceiving that, quite apart from the exceptional intricacy and indefiniteness of some of the problems which the commissioners were required to solve, personal irritation and exasperation more and more stood in the way of the progressive and harmonious disposition of the questions at issue and at length directly contributed to the final suspension of proceedings.[63]

The record of the British Debts Commission, then, is a lesson in the need for careful draftsmanship when creating international tribunals to assess the liability of states, and in the need for some specificity as to the substantive and procedural law which the commission is to apply. The

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[62] Convention With Great Britain, Jan. 8, 1802, 8 Stat. 196, T.S. No. 108. The failure of this commission led to the first utilization by the United States of the lump sum settlement—national claims commission device. See LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 7 (1962).

[63] 4 MOORE, INTERNATIONAL ADJUDICATIONS 103 (1929).

brevity of the commission's sessions, its lack of decisions and its special problems rendered it devoid of useful precedent. Perhaps the best evaluation of its work can be found in a single succinct sentence by Hill: "This board met and remained in session for two years but accomplished nothing because of disagreements." [64]

THE MARITIME CLAIMS COMMISSION

The routine problem of the St. Croix Commission and the failure of the British Debts Commission has caused one international lawyer to note that "from the point of view of its contributions to international law, the third commission formed under the seventh article of the Jay Treaty was by far the most important." [65] This commission, it will be remembered, was created to handle the complaints of Americans against Great Britain arising from the irregular or illegal captures or condemnations of American vessels and other property under color of authority or commissions from England (article VII), as well as British complaints on American outfitting of privateers (article VIII). Five commissioners were to decide claims that came before them "according to the merits of the several cases, and to justice, equity, and the law of nations." [66] Despite the importance and success of this commission's work, its "proceedings have been strangely neglected by historians, though it is one of the most important in the history of arbitration." [67]

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[64] HILL, LEADING AMERICAN TREATIES 53 (1922). Hill is on less solid ground when he continues: "The board revived its sessions after the Treaty of 1802 had provided that the United States should appropriate $2,664,000 for the purpose." This statement is incorrect, since England set up a purely national commission for the adjudication of the claims and the distribution of the indemnity. 3 MOORE, INTERNATIONAL ADJUDICATIONS 359 (1929). It was the Maritime Claims Commission that was reactivated after the 1802 Convention.

[65] RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LACARNO 192 (1929). For a description of the commission's work, see 1 MOORE, HISTORY AND DIGEST 299-349 (1898).

[66] Article VI provided only that claims be decided according to "justice and equity." The inclusion in article VII of "the laws of nations" was a diplomatic victory for Jay, since it "virtually abrogated the orders in council, as affording any justification for the captures under them." 1 JAY, THE LIFE OF JOHN JAY 326 (1833).

[67] MORRIS, INTERNATIONAL ARBITRATION AND PROCEDURE 61 (1911).

The commissioners under articles VII-VIII were to be appointed in a manner similar to their debt commission brethren. Great Britain appointed John Nicholl,[68] who had been acting as London counsel for the United States, and John Antsey;[69] both men were highly satisfactory from the American viewpoint. President Washington appointed Christopher Gore[70] of Massachusetts and William Pinkney[71] of Maryland. The four met in London on August 16, 1796, and nine days later, having been unable to agree unanimously on a fifth, selected Colonel John Trumbull,[72] the American artist, by lot. The quintet formed an able and distinguished commission.

The commissioners sat down to business on October 10, 1796, and were immediately presented with a problem that nearly caused the commission's termination. The issue involved *The Betsey,* and in dispute was whether a decision of the Lords Commissioners of Appeal in Prize Causes, the highest English prize court, which affirmed the sentence of condemnation of a lower prize court, was conclusively binding on the commission. The British commissioners contended that the board had no jurisdiction to "reverse" the Lords Commissioners and make an award. The Americans, admitting the finality of the decision as to the title of the property concerned, argued that the commission had jurisdiction to consider the merits of the claim and possibly give redress, not by reversing the Lords and restoring the vessel but by awarding compensation. The British commissioners having withdrawn to prevent action on the question,[73] resort was had to Lord Chancellor Loughborough,

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[68] 4 MOORE, INTERNATIONAL ADJUDICATIONS 63 (1929). He resigned in November 1798 and was followed by Maurice Swabey.

[69] *Id.* at 64.

[70] *Id.* at 64-65.

[71] See Lillich, *William Pinkney: The Legal Colossus,* 41 THE SPEAKER 11 (1958).

[72] 4 MOORE, INTERNATIONAL ADJUDICATIONS 72 (1929). Colonel Trumbull was far less partisan than his counterpart on the British Debts Commission, John Guillemard. The selection of a moderate was helped by having each side pick, from a panel of proposed names, the nominee of the other. In the case of the commission meeting at Philadelphia, each side had merely nominated one of its nationals.

[73] Thus both the United States and Great Britain made use of the ques-

who advised the group that " 'the reasons assigned . . . against the jurisdiction of the commissioners, or in bar of the claim, are the very cases which it was intended should be examined and decided by the commissioners.' "[74] Following this opinion, awards were made by the commission whenever the condemnation appeared unjust.

During the course of the disagreement, it was suggested that future embarrassments were bound to occur if, upon any challenge to jurisdiction, the commissioners had to refer to one or both of their respective governments rather than ruling on the matter themselves. The Lord Chancellor, answering this question, "declared that 'the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd, and that they must necessarily decide upon cases being within, or without their competency.' "[75] Thus one potential source of friction, questions of jurisdiction, was kept within the judicial bounds of the mixed commission and without the area of further international negotiation. Carlston has called this decision "one of the earliest and most notable instances in which the power of an international commission to decide questions of its own jurisdiction was upheld."[76]

The second major problem which confronted the commission was the question of the exhaustion of local remedies and when failure to have exhausted them was excusable. A large number of claims were pending before the Lords Commissioners awaiting their final decision, and the question was raised whether the commission could take jurisdiction of these pending cases. It was finally decided that while judicial remedies, through an appeal to the Lords, had to be exhausted, once that tribunal had confirmed a decree

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tionable technique of the walkout. Hudson concludes that, although the quorum problem arose twice and was much debated, "no definite solution was given to it." HUDSON, INTERNATIONAL TRIBUNALS 53 (1944).

[74] 4 MOORE, INTERNATIONAL ADJUDICATIONS 811 (1929).

[75] RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LACARNO 193 (1929).

[76] CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 75 (1946). See also the discussion of the question in 6 MOORE, A DIGEST OF INTERNATIONAL LAW 697 (1906).

of restitution the necessity of the claimant seeking to compel the captors to comply with the decree was obviated. The commission was to make awards in such cases and the British government, by virtue of assignments provided for in the treaty, would then seek recovery from the captors.[77]

The third major question that came before the commissioners involved the definition of contraband. In the case of *The Neptune*,[78] an American ship loaded with foodstuffs headed for France was captured and taken into a British port. Eventually the vessel was restored, but the British government paid the owners less for the cargo than its market price either in London or the intended French port. The owners claimed the difference in price between what was paid them and what they would have received had the ship not been seized and had reached France. When the claim came before the commission, the owners were successful by a three-to-two vote. The British agent asserted that the foodstuffs were contraband, claiming that they should be so classed and the applicable Order-in-Council justified because England had been attempting to bring France to terms by famine and because England herself was threatened with a scarcity of those articles directed to be seized. The majority, however, held "that so far as authorities of writers on the law of nations can influence this question, the orders of 1795 cannot be rested upon any just notion of *contraband*. Nor can they in that view be justified by the reasons of the thing or the approved usage of nations." [79] Hence the concept of contraband was kept within its historically accepted bounds.

The commission's activities were interrupted on July 20, 1799, when the two British commissioners withdrew in retaliation for the withdrawal of America's two commissioners on the British Debts Commission. Proceedings remained suspended until the Convention of 1802, article III of which provided that the commissioners under article VII of the Jay Treaty should reassemble and resume their

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[77] 4 MOORE, INTERNATIONAL ADJUDICATIONS 99-100 (1929).
[78] *Id.* at 372.
[79] *Id.* at 387.

duties. This they did in February of that year. One of their first decisions upon reconvening was to hold that interest accrued on compensable claims during the retaliatory suspension of the commission.[80]

In addition to important questions relating to illegal interference with American shipping, the commissioners spent considerable time weighing neutrality claims against the United States. Article VIII provided that this country would stand liable for the losses of British merchants "by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by vessels originally armed in ports of the said States." The decisions of the commission, especially relating to the last clause above, were fruitful precedent for the so-called Alabama Claims in 1872.[81]

When the commission concluded its business on February 24, 1804, it had awarded $11,650,000 to American claimants and $143,428.14 to British claimants,[82] fulfilling John Jay's main objective in negotiating the treaty that bears his name—the compensation for losses sustained by American merchants in consequence of the Orders-in-Council.[83] Furthermore, it had eliminated, at least temporarily, the major source of tension between the two English-speaking nations. "In both countries," Moore writes with restraint, "the results of the commission gave satisfaction." [84]

CONCLUSION

What can be learned from the above case study of the three Jay Treaty Commissions? The St. Croix River Commission suggests that the work of a mixed claims commission is facilitated if the subject matter of the dispute is both narrow and one which permits some degree of "com-

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[80] *Id.* at 119.
[81] *Id.* at ix.
[82] MORRIS, INTERNATIONAL ARBITRATION AND PROCEDURE 61-62 (1911).
[83] 1 JAY, THE LIFE OF JOHN JAY 322 (1833).
[84] 4 MOORE, INTERNATIONAL ADJUDICATIONS 161 (1929).

promise" in the decision-making process.[85] The British Debts Commission, in fact not a true "mixed" commission, emphasizes the need for amicable, as well as impartial, commissioners and the necessity of well-drafted legal standards. The Maritime Claims Commission demonstrates that when commissioners perform their duties with speed and impartiality, the mixed claims commission is a useful device for the settlement of international claims and the development of customary international law.

Why, then, does the United States, which professes some interest in this method of adjudicating claims,[86] fail to press for the establishment of such commissions?[87] Aside from the advantages of the national commission device,[88] two reasons stand out. In the first place, the vast number of claims that have arisen in the postwar period demand speedy adjudication. The present writer is of the opinion that the mixed claims commission could have been modified in most cases to achieve this result, but the fact of the matter is that no innovations have been suggested by the United States that would restyle the device to meet the needs of most present-day claims programs.[89]

Secondly, the establishment and successful operation of a mixed claims commission requires mutual confidence between the United States and the foreign country involved, confidence that each country will select impartial commissioners and will honor the commission's awards. While the United States might be willing to submit claims against a

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[85] "[T]he mixed commission worked best, where the subject matter of the dispute allowed or encouraged the commissioners to act to some extent as negotiators rather than as judges, to temper justice with diplomacy, to give a measure of satisfaction to both sides, for example, in a territorial dispute." SIMPSON & FOX, INTERNATIONAL ARBITRATION 3 (1959). Compare Moore's views in the text at note 35 *supra.*

[86] Department of State Memorandum entitled "Nationalization, Intervention or Other Taking of Property of American Nationals," March 1, 1961, reprinted in 56 AM. J. INT'L L. 166 (1962).

[87] See text at and accompanying note 4 *supra.* See also text accompanying note 91 *infra.*

[88] See LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 116-18 (1962).

[89] Compare SOHN, PROPOSALS FOR THE ESTABLISHMENT OF A SYSTEM OF INTERNATIONAL TRIBUNALS, IN INTERNATIONAL TRADE ARBITRATION 63 (Domke ed. 1958).

country like Great Britain to a mixed commission, both countries having a high respect for the judicial process and a similar legal tradition, it is doubtful whether the United States would consider entering into such an arrangement with a Communist or "neutral" country, absent some sudden thaw in the international climate.[90] As Soubbotitch has explained:

> the respective advantages of two devices, the national and the international claims commissions, will ultimately depend upon the standing, legal philosophy, foreign policy and financial reliability of the nation with which the United States is to reach a settlement agreement. A mixed claims commission with Canada may be preferable to a lump-sum agreement, whereas a lump-sum agreement with the U.S.S.R., Bulgaria or Egypt would probably be preferable to a commission composed of one American member, a member of that other state, and an umpire, whose every award would have to be enforced against that other state.[91]

Therefore, while much of the importance of the Jay Treaty Commissions today lies in their historical significance, marking as they do the birth of modern international arbitration, they also serve as a reminder that two members of the international community, when they wisely delegate to intelligent, patient and moderate men the task of settling international differences by judicial means, can reasonably anticipate success. Although it is accurate to say "that most

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[90] See Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. CHI. L. REV. 458, 475 (1950). See also LILLICH, *op. cit. supra* note 88, at 12-15.

[91] Soubbotitch, Book Review, 16 RUTGERS L. REV. 634, 637 (1962). The Department of State, while pressing Canada for a settlement of the so-called "Gut Dam Claims" or their submission to a tribunal for adjudication, acquiesed in a 1962 statute authorizing and directing the Foreign Claims Settlement Commission to determine the validity and amount of such claims for such action as the President may deem appropriate. Gut Dam Claims Act, 76 Stat. 387 (1962). See S. REP. No. 1750, 87th Cong., 2d Sess. (1962). See also Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 MICH. L. REV. 1079, 1097-98 (1962). Claims must be filed with the Commission on or before October 15, 1963. FCSC Reg. § 560.1, 27 Fed. Reg. 1129 (1962). It will be interesting to see whether these claims, which in view of the countries involved are ideally suited for adjudication by a mixed claims commission, will be handled by this device or by the lump sum settlement method. For some speculation on this point, see the author's article which will appear in the Summer 1963 issue of the *Iowa Law Review*.

United States nationals with international claims against foreign countries will be presenting them, at least in the foreseeable future, to the Foreign Claims Settlement Commission," [92] it is hoped that the Department of State will choose the establishment of a modernized mixed claims commission whenever the situation warrants, since only by the repeated resort to such commissions is the needed basis for an international judicial system likely to develop.

[92] LILLICH & CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 115-16 (1962).